No. 2791

United States
Circuit Court of Appeals
For the Ninth Circuit

THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913, *Appellant,*

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, interveners, *Appellees.*

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener, *Appellant,*

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased. GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913, *Appellees.*

BRIEF OF INTERVENER, JAKE M. SHANK

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

ALFRED A. FRASER,
Solicitor for Intervener, Jake M. Shank.

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Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

As the statements of facts in this case have been set out quite fully in the briefs heretofore filed in this action, we shall confine ourselves to a discussion of the principal assignments of error relied upon by the appellants.

We assume that the principal assignments of error relied upon by the appellant, The Equitable Trust Company of New York, raises the question as to the right of an unsecured or general creditor to intervene in the foreclosure proceedings, and by such intervention attack the validity of the mortgage or trust deed, and The Equitable Trust Company being an only party to the action who could raise this question if this assignment is not well taken as to this particular appellant it is eliminated.

First, we call the Court's attention to the fact that there is nothing in the record which affirmatively shows that this question was presented in the trial court. A motion was made in the trial court by The Equitable Trust Company to dismiss the petitions in intervention, but this motion was general in its terms and did not specifically point out or set forth as one of the reasons for such dismissal the fact that the interveners were general creditors who had not exhausted their remedy at law. These motions were by the Court overruled. The record does not show that any exceptions were taken to this ruling of the Court. The record does show that after these motions were overruled, it was stipulated on behalf of The Equitable Trust Company that the allegations of the petitions of intervention should be deemed to be denied. In other words, it filed a general answer, and in this answer they did not set forth these matters as a matter of special defense as required by the equitable rules.

The trial court in its opinion uses language which would indicate that this question was discussed in some

form or other during the trial of this case, but the opinion of the trial court is not part of the record, and in this case if the Court had omitted to prepare or file an opinion, then the record would be silent upon this question.

This objection does not go to the jurisdiction of the Court, and is waived if not presented seasonably. In the case of Hollins v. Iron Co. 150 U. S. 371; 14 Sup. Ct. 127, the effect of a failure to bring such an objection seasonably to the attention of the Court is thus stated on page 380, 150 U. S. and page 128 Sup. Ct.

> "It is urged, however, that this court has sustained the validity of proceedings and decrees in suits of this nature in which it appeared that the plaintiffs had not exhausted their remedies at law; and the cases of Sage v. Railroad Co. 125 U. S. 361, 8 Sup. Ct. 887, and Mellen v. Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, are cited as illustrations. But, passing by other matters disclosed by the facts of those cases, it will be noticed that in neither of them was the objection made at the outset, and when action on the part of the court was invoked. Defenses existing in equity suits may be waived, just as they may in law actions; and, when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal. Take the present case as an illustration. Suppose the corporation and other defendants had made no defense, and without expressly consenting, had made no objection to the appointment of a receiver, and the subsequent distribution of the assets of the corporation among its creditors; it cannot be doubted that a final decree providing for a settlement of the affairs of the corporation and a distribution among creditors could

not have been challenged on the ground of a want of jurisdiction in the court, and that notwithstanding it appeared upon the face of the bill that the plaintiffs were simple contract creditors, because the administration of the assets of an insolvent corporation is within the function of a court of equity, and, the parties being before the court, it has power to proceed with such administration. If there was a defense existing to the bills as framed,—an objection to the right of these plaintiffs to proceed on the ground that their legal remedies had not been exhausted,—it was a defense and objection must be made in limine, and does not of itself oust the court of jurisdiction. This doctrine has been recognized, not merely in the cases cited, but also in those of Reynes v. Dumont, 130 U. S. 304, 9 Sup. Ct. 486; Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594; Brown v. Iron Co. 134 U. S. 530, 10 Sup. Ct. 604. None of these cases question the proposition that, if the objection is seasonably presented, it will be effective."

Temple v. Glasgow, 80 Fed. 441.

Foltz v. St. Louis & S. D. R. Co. 8 C. C. A. 641; 60 Fed. 322.

Union R. R. Co. v. Martin, 12 C. C. A. 601.

Atlantic Trust Co. v. Dana, 62 C. C. A. 673; 128 Fed. 225.

Conceding the general rule to be that a general creditor must first reduce his claim to judgment and have an execution returned nulla bona before he is in a position to attack a transfer of his debtor's property, yet this rule is not absolute, and when such a proceeding would be vain and involve useless expense, the law will not demand it.

In Case vs. Beauregard, 101 U. S. 688; 25 L. Ed. 1004, the Supreme Court said:

"It is no doubt generally true that a creditor's bill to subject his debtor's interests in property to the pay-

ment of the debt must show that all remedy at law had been exhausted. And generally, it must be averred that judgment has been recovered for the debt; that execution has been issued, and that it has been returned nulla bona. The reason is that until such a showing is made, it does not appear, in most cases, that resort to a court of equity is necessary, or, in other words, that the creditor is remediless at law. In some cases, also, such an averment is necessary to show that the creditor has a lien upon the property he seeks to subject to the payment of his demand. The rule is a familiar one that a court of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must, therefore, show that he has done all that he could do at law to obtain his rights. But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without a remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity required a meaningless form. 'Bona, sed impossibilia non cogit lex.' It has been decided that where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility the issue of an execution is not a necessary prerequisite to equitable interference." (Citing authorities.)

In the case of Alder Goldman Commission Company et al. vs. Williams et al. 211 Fed. 531, the Court said:

"The general rule prevailing in the national courts, as well as in courts of equity generally, is well established that, to maintain a creditor's bill to set aside a fraudulent conveyance, the creditor must have reduced his claim to judgment, and have an execution issued upon the judgment and returned unsatisfied. The reasons upon which this rule is based, as enunciated by the different courts which have passed

upon that question, are, (1) A debtor is entitled to a trial by jury for the purpose of determining the correctness of the demand, and there can be no jury trial in a court of equity; (2) to justify the interposition of a court of equity, the remedy at law must have been exhausted, and that can be shown by proof that a judgment had been obtained, an execution issued thereon, and returned nulla bona; (3) the existence of a lien upon the property, or interest in the property, created either by contract or by a judgment which is a lien.

"As to the right of a trial by jury to have the validity of the demand determined, it is sufficient to say that the justice of the demands is not questioned. The motion to dismiss admits them. That being the case, there is nothing to submit to a jury, and equity never requires a useless thing to be done. A creditor need not reduce his claim to judgment where the correctness of the claim is admitted or not denied. D. A. Tompkins Co. v. Catawba Mills (C. C.) 82 Fed. 780; Neiters v. Brockman, 11 Mo. App. 600; Cohen v. Morriss, 70 Ga. 313.

"As to the second ground the courts have established several exceptions to the general rule. One of them is that when it is shown that it is impossible or impracticable to obtain a judgment, another if a judgment has been secured, there is no property which can be subjected to an execution. Still another exception is when the property has been fraudulently conveyed by the debtor, then the remedy at law is wholly inadequate, and a resort to equity may be had. Thus, it has been held that the issuance of an execution is not a necessary prerequisite to a creditor's bill when it appears that a debtor has no property which is subject to an execution at law and the issuance of the execution would be of no practical utility. Sage v. Memphis & Little Rock R. R. Co. 125 U. S. 361, 8 Sup. Ct. 887, 31 L. Ed. 694; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112; Talley v. Curtain, 54 Fed. 4, 4 C. C. A. 1771; Schofield v. Ute Coal & Coke Co. 92 Fed. 269, 34 C. C. A. 334; Iazarus Jewelry Co. v. Steinhardt, 112 Fed. 614, 50 C. C. A. 393.

"As stated in Sage v. R. R. Co., supra:

" 'When the suing out of an execution would be an idle ceremony, causing useless expense and being of no real benefit to the plaintiff, it is unnecessary.'

"The courts almost universally recognize the rule that where the recovery of a judgment at law is impracticable, it is not an indispensable requisite to a creditor's bill. Kennedy v. Creswell, 101 U. S. 641, 645, 25 L. Ed. 1075; Case v. Beauregard, 101 U. S. 688, 690, 25 L. Ed. 1004; Mellen v. Moline Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178; National Tube Works v. Ballou, 146 U. S. 517, 523, 13 Sup. Ct. 165, 36 L. Ed. 1070; Wyman v. Wallace, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738; Hibernia Insurance Co. v. St. Louis & New Orleans Trans. Co. (C. C.) 10 Fed. 596; Consolidated Tank Line Co. v. Kansas City Varnish Co. (C. C.) 45 Fed. 7; Guaranty Title & Trust Co. v. Pearlman (D. C.) 144 Fed. 550."

In the case of Talley v. Curtain et al. 54 Fed. 43, a case decided in the Circuit Court of Appeals of the Fourth Circuit, the Court in the syllibi say:

"A creditor's bill to set aside an assignment of all the debtor's property for the benefit of creditors may be maintained though plaintiff's claim has not been reduced to judgment, when such claim is recognized and provided for in the deed of assignment, and is not disputed by the pleadings, since it is obvious that a judgment and execution would afford no remedy at all, and that there is no remedy at law. 46 Fed. Rep. 580, affirmed.

"The debt being thus solemnly admited by all parties, and the principal question being as to the validity and construction of the trust created by the deed of assignment, equity jurisdiction cannot be defeated on the ground that, the claim being for a money payment exceeding $20, the defendants are entitled to trial by jury under the seventh amendment to the constitution of the United States. 46 Fed. Rep. 580, affirmed. Scott v. Neely, 11 Sup. Ct. Rep. 712, 140 U. S. 106, distinguished."

If the trial court did err in permitting general creditors to intervene in this proceeding, it was error without prejudice for the reason that the appellants, The Equitable Trust Company, expressly waived the assignment of error covering this question. The assignment of error No. 15 is as follows:

> "Because the court erred in not entering judgment in favor of the complainant for the full amount of the bonds issued and outstanding, to-wit: $2,230,000 with interest from the first day of May, 1914, at the rate of 5 per cent per annum. (Transcript page 254)"

And the statement as settled by the trial judge contains the following:

> "Before settling the statement, counsel for appellant expressly waived its last assignment of error (No. 15) and therefore, the statement is not made complete relative to the point therein involved." (Transcript page 176.)

The trial court in the decree in this case reserved the right to thereafter determine the amount due the said Equitable Trust Company, as trustee for the bondholders. (Transcript page 208.) So the record at the present time discloses the fact that The Equitable Trust Company has expressely waived this question, and if the same was not waived, there is nothing in the record to show that The Equitable Trust Company has any deficiency judgment or that it ever will be entitled to one, and it was admitted by counsel for The Equitable Trust Company upon the argument that they had not as yet procured any deficiency judgment.

But even conceding, for the sake of argument, that The Equitable Trust Company had a deficiency judgment, we insist that the lien of such judgment would be inferior to the lien of these interveners to the proceeds of the $45,000 involved in this proceeding. In fact, we contend that The Equitable Trust Company occupies a more unfavorable position than any other creditor seeking to pro-rate with these interveners in this case, for the reason that The Equitable Trust Company not only did nothing to assist in uncovering and obtaining this $45,000 for the creditors, but resisted in every way it could the creation of this fund.

The Equitable Trust Company and these intervening creditors have been fighting at arms length, each endeavoring to establish a priority over the other. We have been victorious, and the mortgage or deed of trust has been declared void as to us. Our preference must be recognized, and the claim of the losing party postponed. Where the field was open to all he who first secured a priority shall reap the reward of his diligence.

The Equitable Trust Company claimed under this mortgage or deed or trust and defended it against the just claims of the interveners. It has never abandoned its adverse position and is even now insisting in this Court upon a reversal of our decree, occupying as it does this antagonistic position, it seeks to share in the fruits of our recovery. This, in equity, we claim it has no right to do.

Our rights as interveners to the fund in question is superior to that of all other creditors. The rule is stated in 12 Cyc. page 61, as follows:

> "The principle is well established that where a creditor by his superior diligence discovers and uncovers property which could not be seized on execution at law, and properly files a creditors' bill to subject such property of the debtor to the satisfaction of his judgment, he acquires a lien on such property and becomes entitled to the satisfaction of his judgment out of such property in preference to other creditors, even though other creditors have judgments obtained prior to the time when the complaining creditor obtained his; and to the fastening or preservation of such a lien no injunction or attachment or levy on the property is necessary."

The two leading cases in America on this question are the cases of Edmeston v. Lyde, 1 Paige Ch. Rep. 636, and McDermott et al. v. Strong, 4 John. Ch. R. 687.

In the Edmeston case, the Court say:

> "And on further examination it may seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination, should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions, when there could no longer be any risk in becoming parties to the suit."

And again:

> "If the creditor whose execution is first returned unsatisfied pursues the race of legal diligence, by the commencement of a suit here, he will obtain the reward of his vigilance; but if he abandons the pursuit, or lingers on the way, before he has obtained a specific lien, he has no right to complain if another creditor obtains a preference by superior vigilance."

And in the case of McDermott v. Strong, Chancellor Kent said:

> "Though it be the favorite policy of this court to distribute assets equally among creditors pari passu,

yet, whenever a judicial preference has been established, by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by this court."

The above two cases are cited with approval by the Supreme Court of the United States in the case of Freedman's Savings & Trust Company v. Earle, 110 U. S. 710. In this case the Court say:

"It is to be noted, therefore, that the proceedings is one instituted by the judgment creditor for his own interest alone, unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause; and as no specific lien arises by virtue of the judgment and execution alone, the right to obtain satisfaction out of the specific property sought to be subjected to sale for that purpose dates from the filing of the bill. 'The creditor,' says Chancellor Walworth, in Edmeston v. Lyde, 1 Paige, Ch. 637-640, 'whose legal diligence has pursued the property into this court, is entitled to a preference as the reward of his vigilance;' and it would 'seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions when there could no longer be any risk in becoming parties to the suit.' As his lien begins with the filing of the bill, it is subject to all existing incumbrances, but is superior to all of subsequent date."

And again, the Court say:

"The passage cited from the opinion in Day v. Washburn, supra, speaks of the preference thus acquired by the execution creditor as a legal preference. It was distinctly held so to be by Chancellor Kent in McDermott v. Strong, 4 Johns. Ch. 687. He there

said: 'But this case stands on stronger ground than if it rested merely on the general jurisdiction of this court, upon residuary trust interests in chattels, for the plaintiffs come in the character of execution creditors, and have thereby acquired, by means of their executions at law, what this court regards as a legal preference, or lien on the property so placed in trust;' and 'admitting that the plaintiffs had acquired, by their executions at law, a legal preferance to the assistance of this court (and none but execution creditors at law are entitled to that assistance), that preference ought not, in justice, to be taken away. Though it be the favorite policy of this court to distribute assets equally among creditors, pari passu, yet, whenever a judicial preference has been established by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by this court.' The decision in that case was made, giving the priority to the execution creditors who filed the bill, when, otherwise, by virtue of an assignment by the debtor who was insolvent, the proceeds of the equitable interest sought to be subjected would have been distributed ratably among all creditors."

In the case of Federal Insurance Co. v. Detroit Fire & Marine Company, Circuit Court of Appeals of the Sixth Circuit, 202 Fed. 648, on page 656, the Court say:

"No distinction is perceived between the principle that should be applied here and that which prevails in equitable proceedings brought to enforce judgments against interests of debtors that cannot be reached by ordinary legal process. If priority is sought in such proceedings, the suit must be limited to that object, and not in terms extended to all creditors of the same class or creditors generally. This principle is applied in a variety of cases. For instance, in George v. St. Louis Cable & W. Ry. Co (C. C.) 44 Fed. 122, 123, the late Circuit Judge Thayer, when speaking upon rehearing of a proceeding by judgment creditors

to subject property that could not be effectively reached by execution at law, said:

"'I have no doubt that the three complainants by whom the bill in this case was filed might have secured a priority by filing the same for their own benefit; but they did not do so. By the very terms of the bill, they professed to be acting not only for themselves, but "in behalf of, all and singular, the other judgment creditors of the respondent." The effect was to waive the advantage they might have obtained by moving in their own behalf. The result is that the suit, in contemplation of law, has from the beginning been prosecuted by the original complainants in behalf of all judgment creditors who might elect to come in and take advantage of what had been done in their behalf.'

"The same principle was recognized by Justice Bradley in Johnson v. Waters, 111 U. S. 640, 674; 4 Sup. Ct. 619, 637 (28 L. Ed. 547), and by Justice Matthews in Freedman's Savings & Trust Co. v. Earle, 110 U. S. 719, 716; 4 Sup. Ct. 226, 229 (28 L. Ed. 301), where he states the rule thus:

"'It is to be noted, therefore, that the proceeding is one instituted by the judgment creditor for his own interest alone unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause.'"

In Seymour v. McAvoy, 53 Pac. 946, the Supreme Court of California say:

"A judgment creditor, by filing a bill in equity to subject equitable assets to the payment of his judgment, acquires an equitable lien on such assets and a priority over any other creditor who has not already filed such a bill. Other judgment creditors who have not filed such a bill are therefore not necessary parties to the action, and their presence is not necessary for the protection of the defendants. The court therefore did not err in refusing to bring in as parties other judgment creditors who had not themselves commenced any such suit."

In Reis v. Ravens, 68 Ill. App. 53, the Court say:

> "It is a well established doctrine that a creditor who has by calling to his aid a court of equity and by the exercise of his superior diligence discovered and uncovered property which could not be discovered and seized upon execution at law is entitled to a preference over other creditors."

In Gordon v. Lowell, 21 Me. 251, it was held that where a creditor has, through the instrumentality of a court of equity, sought out and discovered property of his debtor which he had before been unable to discover and seize upon execution at law, he becomes entitled to a preference over other creditors to have his judgment first satisfied even under the insolvent laws.

When a conveyance is void as to creditors, they, or any of them, may in a court of equity have the same set aside. The creditors who first filed his bill obtains thereby a priority and is entitled to be first paid from the proceeds of the sale of the land, if there are no valid prior liens.

George v. Williamson, 26 Mo. 190.

Bank v. Burke, 4 Blackf. 141.

Petway v. Hoskin, 12 Lea. 107.

Carning v. White, 2 Paige, 567.

McDermutt v. Strong, 4 Johns. Ch. 687.

Smith v. Lind, 29, Ill. 24.

Logan v. Robbins, 46 Ill. 277.

Rappleye v. Bank, 93 Ill. 396.

Claflin v. Foley, 22 W. Va. 434.

In Cole v. Marple, 98 Ill. 58, the Court in the syllibi say:

> "Where a creditor files a bill to subject property or a fund in the hands of a third person to the payment of his debt, he thereby acquires a lien upon such prop-

erty or fund and upon recovery will be entitled to a preference in the satisfaction of his claim to the exclusion of other creditors."

Ballantine v. Beall, 3 Scam. 204.

Alexander v. Tams, 13 Ill. 221.

We particularly call the Court's attention to the case of Clark v. Figgins et al. 5 S. E. 643. The case was decided in the Supreme Court of Appeals of West Virginia. The facts in this case are very similar to the case at bar, and the Court, after reviewing the authorities upon this question at length, say:

"In Rappleye v. Bank, 93 Ill. 402, Mr. Justicte Sheldon said, in delivering the opinion of the court: 'Although appellant might have proceeded and have avoided the trust deed, and have subjected the estate thereby conveyed to the satisfaction of his judgment, or have had the lots sold on execution, he did not choose to assume that burden or expense. Appellee then assumed the undertaking of avoiding the trust deed, and succeeded in affecting the removal of the incumbrance, encountering all the expense and labor thereof. It is through this proceeding of appellee that this estate conveyed by the trust deed has been secured for application to the satisfaction of these judgments. Appellant now comes forward to appropriate to himself all the benefit. It does not seem just, and we think, under the equitable doctrine which courts apply in analogous cases, and the decision in Lyon v. Robbins, 46 Ill. 279, appellee is fairly entitled to a preference, as a reward of its diligence.' Here the three firms to whom the reward of diligence was granted, filed their answers in the court below, and were the only defendants who did so, attacking the said trust deed for fraud. They were fought in this by the plaintiffs in that suit, who were seeking a preference by trying to show the deed was valid. The other defendants contented themselves by standing idly by and seeing these active defendants

carry on the contest at their own labor and expense. When these answers were filed, quo ad, these defendants claimed the effect was the same as if they had filed a bill for the purpose of having said trust deed declared fraudulent, and they may be regarded in the nature of cross-bills. At that time there were no prior liens on the property, as all the attachments were subsequently declared void. These three firms were beaten in the court below, and decreed to pay costs with Dager & Co., Maddux Bros., H. N. Baily, and Allemony, Bear & Co. Three of these parties were applied to by Ruffner Bros., Arnold Abney, and Hurst, Purnell & Co. to join them in an appeal and declined. None of the others came forward to join in the appeal. These three firms alone applied for the appeal, which was granted, and the decree reversed, and trust deed set aside as fraudulent. It seems to us this cause, in all its circumstances, is within the maxim, vigilantibus, non dormientibus, jura subveniunt. There would be no reward to the vigilant if these parties were now compelled to step aside, and let those who fought them persistently all through the cause, in both courts, and those who stood by and did nothing, take the fruits of their labor and expense, or to be compelled to divide it with them."

In regard to the appeal of the American Water Works Company, we contend that no error was committed by the action of the trial court in this matter. The amended petition in intervention of this company which was presented to the trial court did not ask or seek to have the judgment theretofore entered set aside, or in any wise modified; nor in this petition did they take issue with any of the allegations of the bill or intervening petitions. The American Water Works Company, in this petition of intervention, did not question the validity of the trust deed, nor did it set forth the defects therein which were relied upon by the interveners, nor did it ask for any relief

whatsoever against the Equitable Trust Company or any of the interveners. The prayer of their petition, and the only relief asked therein, was that this unsecured creditors' fund of $45,000 be turned over into the possession of the receiver in order that they might pro rate therein to the extent of about 97 per cent thereof. They did not seek to discover any other assets or to increase in any way by their diligence or efforts the amount of the unsecured creditors' fund. They are in no better position than any of the creditors, as they have assisted in no way in procuring these funds.

We understand that an appeal has been allowed by the receiver in this case. We have not, as yet, had opportunity to see the assignments of error upon which this appeal is predicated, but we are familiar with the record. The answer filed by the receiver by order of the Court does not attack the validity of the mortgage or the trust deed, nor does the receiver in his ansewr claim that said mortgage or trust deed is void as to him, and as no issue was made upon this question, we can hardly understand how error can be predicated upon a matter which the record discloses was not an issue, and never brought to the attention of the trial court.

In any event, the receiver is in no better position than any of the other creditors. He is no more entitled to the fruits of the labor of the interveners than any one else. Under the authorities which we have heretofore cited in this brief, the rule is uniformly announced that priority in the distribution of the funds is fixed at the time of filing the bill in intervention, and that the receiver's ans-

wer in this case was not filed until after these interveners had filed their petition and raised the question as to the validity of the mortgage. At the time the receiver filed his answer, it is to be presumed that he had knowledge of these defects in the mortgage, but notwithstanding that fact he did not see fit to set forth the same in his answer.

We have no fault to find with the authorities which were cited by counsel for the appellants, but we do claim that none of them are in point in this case.

We desire particularly to impress upon the Court that this is not a case in which the receiver had taken possession of this $45,000, and was holding the same subject to the orders of the Court to be distributed among the general creditors. This fund, so far as the record shows, would never have come into existence except by the efforts of the intervening creditors. Every creditor will receive as much from the assets of this bankrupt concern as they would have received had the interveners permitted this foreclosure to proceed unassailed by them.

Respectfully submitted,

ALFRED A. FRASER,

Solicitor for Intervener, aJke M. Shank.